U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 03 July 2003

BALCA Case No.: **2002-INA-136**
ETA Case No.: P2000-HI-09469857/ML

In the Matter of:

SUPER TRAVEL, INC.,
Employer,

on behalf of

MAYUMI FUKUDA,
Alien.

Appearance: Ben Tao, Esquire
Honolulu, HI

Certifying Officer: Martin Rios
San Francisco, CA

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arose from an application for labor certification on behalf of Mayumi Fukuda ("Alien") filed by Super Travel, Inc. ("Employer") pursuant to section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor, San Francisco, California, denied the application, and Employer requested review pursuant to 20 C.F.R. §656.26.

Under section 212(a)(5), an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has

determined and certified to the Secretary of State and Attorney General that: 1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and 2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On June 14, 1999, Employer, Super Travel, Inc., filed an application for labor certification to enable the Alien, Mayumi Fukuda, to fill the position of "Market Research Analyst" which was classified by the Job Service as "Market-Research Analyst I" under Occupational Code 050.067-014 of the Dictionary of Occupational Titles ("D.O.T.") (AF 83). The job duties for the position, as stated on the application, are as follows:

> Establish[ ] research methodology and designs format for data gathering. Examines and analyses (sic) statistical data to forecast market trends in tourism. Gathers data on the latest tourist trend, and analyzes prices, sales, and methods of marketing. Collects data on tourists' preferences and habits. Conducts surveys to study tourist's reaction to new tour packages to aid improvement and sales of tour packages.

(AF 83). The stated job requirements for the position are as follows: a Bachelor of Science degree in Business Administration or Travel Management; one year of experience in the job offered, and the ability to read and write Japanese (AF 83).

In a Notice of Findings ("NOF") issued on October 18, 2001, the CO proposed to deny certification on the grounds, *inter alia*, that Employer failed to establish that there is a bona fide, permanent, full-time job opportunity to which U.S. applicants can be referred (AF 78-80). Employer submitted its rebuttal thereto on or about November 13, 2001 (AF 5-77). The CO found the rebuttal unpersuasive and issued a Final Determination, dated January 25, 2002, denying certification on the above grounds (AF 3-4). On or about February 3, 2002, Employer filed a Request for Review of the denial of labor certification (AF 1-2). Subsequently, the CO forwarded this matter to the Board of Alien Labor Certification Appeals. On April 2, 2002, the Board issued a "Notice of Docketing and Order Requiring Statement of Position or Legal Brief." Although the record does not contain a timely response thereto, Employer's request for review clearly specifies the grounds for appeal. Accordingly, we will consider this case on its merits.

DISCUSSION

Under 20 C.F.R. §656.3, the term "*Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States...."

In the NOF, the CO cited the foregoing regulatory provision, and set forth the following finding and corrective action:

> Finding: Job Service records indicate you are a small, start-up company; indeed, there are no "surveys" and "designs for data gathering" in evidence even though the alien apparently has been working for your (sic) as a Market Research Analyst for over

three years.

There is some question whether you:

. have a current job opening, and/or

. can provide permanent, full-time employment to which U.S. workers can be referred.

Corrective Action: Submit rebuttal documenting your ability to provide permanent, full-time employment to a U.S. worker at the terms and conditions stated on the ETA 750A. Include with this a copy of your business license (a Seller's Permit does not fulfill this requirement). State and federal business income and business tax returns, and copies of marketing reports alien has developed for you.

(AF 79).

Employer's rebuttal includes a cover letter by Employer's counsel (AF 5), an explanatory letter by Employer's General Manager (AF 6-7), and Exhibits A through H, as described below (AF 8-77). Employer's explanatory letter, dated November 13, 2001, states in pertinent part:

1. Corporate name change

Our company was incorporated under the name "Super Travel, Inc." However, on August 10, 1999, we changed our company's name to "Regency Hawaii Tours, Inc." The name change was duly registered with the Department of Commerce and Consumer Affairs of the State of Hawaii. See, Articles of Amendment to Change Corporate Name, attached as "**Exhibit A**." Therefore, many of the documentary evidence attached herewith bear the new corporate name "Regency Hawaii Tours, Inc."

2. Question as to whether a job opening exists, and/or can provide

permanent, full-time employment to which US workers can be referred

Pursuant to your "corrective action," we have attached Hawaii State General Excise Tax License, as **Exhibit "B,"** State of Hawaii Travel Agency License, attached as **Exhibit "C,"** State of Hawaii Activity Desk License, attached as **Exhibit "D,"** 2000 US Corporation Income Tax Return, attached as **Exhibit "E,"** and 2000 State of Hawaii Corporation Income Tax Return, attached as **Exhibit "F."** As the above documents show, our company is duly licensed to conduct business in the State of Hawaii. It is true that our company has only been conducting business for over three years. However, our company is one of the fastest growing businesses in the State of Hawaii. With annual gross sales of $4,844,595 and assets of $168,405, our company clearly has the ability to provide permanent, full-time employment to a US worker at the terms and conditions stated on ETA750A.

Pursuant to your request, we have also attached as **Exhibit "G,"** a copy of the most recent marketing report prepared by Ms. Mayumi Fukuda. We have also attached copies of materials based on which Ms. Fukuda prepared the report, **Exhibit "H."** Like all other marketing reports of our company, the report attached was prepared in Japanese (because all our company's officers are native Japanese speakers). We have attached an English translation for your review.

(AF 6-7).

In the Final Determination (AF 3-4), the CO rejected Employer's rebuttal regarding this issue, stating, in pertinent part:

NOF questioned whether there actually is a job opening to which U.S. workers can be referred. You rebut with a recent income tax return, a two-week old marketing

survey report and evidence you have changed your business name.

> Your tax return shows you lost money the one year you report; changing your business name does not assure us [your are] an on-going business. Furthermore, the NOF requested you submit **documentation** the incumbent has been engaged in market research since [her] hire three years ago; a report dated just two weeks ago does not satisfy the finding. The evidence is neither convincing you have had a functioning full-time market research analyst nor convincing you are able to offer permanent, full-time employment in the occupation.

(AF 4).

As outlined above, the CO denied certification on the grounds that Employer had failed to adequately document the existence of a bona fide, permanent, full-time job opportunity, to which U.S. applicants can be referred. In making this determination, the CO cited two sub-issues: (1) Employer had lost money in the one year of reported income, and thereby failed to establish that it had sufficient funds to pay for a permanent, full-time research analyst; and, (2) Employer had failed to document that the Alien's work for Employer has been a full-time job, as stated on the ETA 750 B (AF 203), thereby undermining Employer's assertion that the job opportunity is a full-time research analyst position.

Having carefully considered the Appeal File, in particular Employer's 2000 Corporation Income Tax Return (AF 22-25), we note that Employer reported gross sales of $4,844,595; costs of operations of $4,534,529; total income of $310,066; total deductions of $311,611; and a net taxable income of *minus* $1,545. Although the documentation presented by Employer indicates that it is a bona fide business, the stated wage rate for the job opportunity is $23.56/hour, which represents an annual salary of more than $49,000 for a full-time position. Accordingly, it is unclear whether Employer has sufficient funds to pay the prevailing wage rate for a permanent, full-time, market

research analyst.[1]

Even assuming Employer established that it has sufficient funds to pay the above-stated wages, Employer has failed to document that the job opportunity is, in fact, a full-time, permanent position. In the NOF, the CO expressly instructed Employer to provide "copies of marketing reports alien has developed for you," in order to document that the Alien has been working for Employer as a full-time employee (AF 79; *See also* AF 203). In response thereto, Employer only provided "the most recent marketing report" prepared by the Alien (AF 7). As stated by the CO, the report is only two weeks old and does not **document** that the Alien is engaged in full-time employment. We agree.

Although the Alien's translated marketing report is undated (AF 26-33), the original Japanese report has a handwritten notation of "MF Nov. 01, 2001" (AF 35). The foregoing appears to represent the Alien's initials and a date approximately two weeks *after* the NOF was issued (AF 78). This suggests that the Alien may have prepared the current report in furtherance of the labor certification application process. Even assuming that the Alien's November 2001 report was prepared in the ordinary course of business, it is clearly insufficient to document that the job opportunity is a permanent, full-time position. In summary, the CO reasonably requested that Employer provide copies of the Alien's marketing reports; and, as found by the CO, the documentation submitted on rebuttal in response to this issue was inadequate. Accordingly, we find that labor certification was properly denied.[2]

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[1] As outlined above, it does not appear that the Alien has worked full-time for Employer. Furthermore, the salary rate initially offered by Employer (*i.e.*, $30,000/yr.) is substantially less than the amended prevailing wage rate. Therefore, we find that the full salary of $49,000/year has not been factored into the 2000 tax returns.

[2] We also note that the Statement of Qualifications of Alien (AF 202-203) indicates that the Alien gained her qualifying experience as a Market Research Analyst while working for "Ocean Express Hawaii, Inc.," and subsequently began working for Employer, Super Travel, Inc. (AF 203). Interestingly, the addresses of both of the foregoing corporations are identical except for the suite numbers. This raises questions as to whether the two corporations are related; and whether the Alien was, in fact, hired by a predecessor company of Super Travel, Inc., without the stated one year

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

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Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.

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experience requirement. Such a relationship between Ocean Express Hawaii, Inc. and Super Travel, Inc. is plausible in light of the similar addresses and Employer's subsequent corporate name change from Super Travel, Inc. to Regency Hawaii Tours, Inc. However, since the foregoing grounds were not cited by the CO, it is not the basis for our decision herein.